

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6027

United States Court of Appeals FOR THE SECOND CIRCUIT

CAPITAL REGION CITIZENS COMMITTEE, THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE, NEW YORK STATE COALITION FOR SANE TRANSPORTATION - N. Y. STATE COST, TOWN OF ROTTERDAM, ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC., a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERG, CHESTER and JANE SNYDER, JOHN K. and MARY E. ALDERSHOFF and GARRETT J. and DELLA M. ALDERSHOFF, WILLIAM F. and WILMA SCHULTZE, ARTHUR W. and JANICE SCOTT, ROBERT G. and MARY LOU SAWYER, and DANIEL T. and DORIS SEIF,

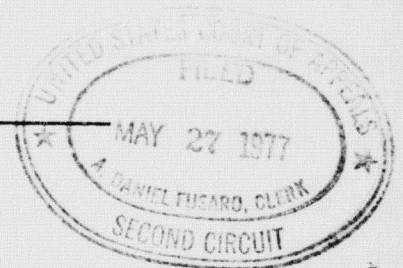
Plaintiffs-Appellants,

-against-

JOHN A. VOLPE, Secretary of Transportation of the United States; GERALD D. LOVE, Regional Federal Highway Administrator of the Bureau of Roads, United States Department of Transportation; ROBERT E. KIRBY, Division Engineer of the Bureau of Roads, Federal Highway Administration, United States Department of Transportation; THEODORE W. PARKER, Commissioner of the Department of Transportation of the State of New York; and CHARLES E. CARLSON, Regional Director, New York State Department of Transportation, Region 1, And each and every one of the foregoing individually as well as in his designated official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



REPLY BRIEF OF PLAINTIFFS-APPELLANTS The Richmondville Property Owners Committee, et al.

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United States Court of Appeals FOR THE SECOND CIRCUIT

CAPITAL REGION CITIZENS COMMITTEE, THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE, NEW YORK STATE COALITION FOR SAFE TRANSPORTATION - N. Y. STATE COST, TOWN OF ROTTERDAM, ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC., a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERG, CHESTER and JANE SNYDER, JOHN K. and MARY E. ALDERSHOFF and GARRETT J. and DELLA M. ALDERSHOFF, WILLIAM F. and WILMA SCHULTZE, ARTHUR W. and JANICE SCOTT, ROBERT G. and MARY LOU SAWYER, and DANIEL T. and DORIS SEIF,

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS The Richmondville Property Owners Committee, et al.

This brief is in reply to the briefs of the New York and Federal appellees, particularly to the extent that they have sought to assert the lack of material issues of fact as related to the lower court's summary disposition of the cause, without trial.

It is appellants' position that the issues raised below did, in fact, involve genuine issues as to material fact under Rule 56(c) of the Federal Rules of Civil Procedure, and that appellees were not entitled to judgment as a matter of law under the rule and existing authority. Because of the failure of the court below, after appropriate consideration upon trial, to have resolved these issues on the basis of a hearing record, with findings of fact and conclusions of law, we consider that an inappropriate burden is placed on the appellate process to the extent that the issues currently before the Court are more appropriately to be determined initially at the trial level.

More importantly, from the viewpoint of the implementation of national policy as embodied in the National Environmental Policy Act of 1969, Pub.L. 91-190, 83 Stat. 852, 42 U.S.C., Section 4321, et seq., and other aspects of Federal law respecting hearings and the protection of public park and recreation lands, water quality and the appropriate expenditure of Federal funds, it is a matter of concern that lower courts, as here, sometimes apply such laws to diverse standards to the detriment of the important national policies sought by Congress to be effected by such legislation.

This divergence is accentuated at agency levels to the

extent that traditional departmental and administration policies, such as those involved in highway building, as here, are closely related to administrative self-interest in the continued existence of the agency and perpetuation of its program often heavily funded, although in many ways they may indeed run counter to such national policies.

In such cases, as here, the effective observance of these Federal environmental and public participation requirements at the agency level would seriously curtail, and perhaps eliminate certain agency programs. Under such circumstances, it is understandable, although not legally justifiable, that the failure or refusal of agencies, such as those involved here, effectively to carry out Federal requirements in this regard, constitutes a further range of administrative slippage in the implementation of these policies.

In light of this, appellate reluctance in this context to permit indiscriminate use of the summary judgment procedure to resolve such issues (cf. Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 700 (2nd Cir., 1972)) is indeed appropriate. The judicial discipline of trial, with findings of fact and conclusions of law, while perhaps a burden on a district judge faced with such issues is, in the long run, both a net saving of time and judicial energies since a disposition with such judicial safeguards is definitive as to the factual issues in-

involved and reserves for appropriate appellate determination any legal questions that remain.

Further, it assures consideration of the important Federal questions involved in terms of national policy in the disciplined context of a judicial record, after hearing, with findings of fact and conclusions of law. To lessen these standards at the appellate level is to minimize their importance in the district courts and, in effect, abandon any real assurance of their observance in the agencies themselves, faced as they are with competing and often antithetical administrative goals related to the continued existence of the agency, its funding, and continuation of existing programs.

By Public Law 94-83, 42 U.S.C., Section 4332(D), eff. Aug. 9, 1975, provision is made that an environmental impact statement, prepared as here for a Federal action under a program of grants to States, shall not be deemed legally insufficient solely by reason of having been prepared by a State agency or official, if (i) the State agency or official has statewide jurisdiction and has the responsibility for such action, (ii) the responsible Federal official furnishes guidance and participates in such preparation and (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption; further, it is provided that the procedures of the Public Law shall not relieve the Federal official of his re-

sponsibilities for the scope, objectivity, and content of the entire statement of any other responsibility under the National Environmental Policy Act.

It is respectfully urged, on the basis of the record, that the State and Federal defendants have failed to comply with the requirements of Public Law 94-83, and of the Act itself, and that there are material issues of fact relating thereto that were not properly to be resolved by summary means. In particular, and put in simple terms, what is proposed to be built is a new Interstate Highway between Binghamton and Schenectady at a cost in the range of hundreds of millions of dollars. Medium-distance and long-distance interregional traffic is estimated at less than 650 vehicles per day (Final Supplemental Environmental Impact Statement, etc., Interstate Route 88, Schoharie-Schenectady County Line to N.Y.S. Thruway (i-90) Schenectady County (Rec. on App., p. 562) at E.I.S., p. 5, 4th para.). In light of this minimal interstate or even interregional use, it is obvious that this Interstate is being built for local service only, at an estimated cost in the range of some \$450,000,000. Near Binghamton, it will obviously feed Binghamton, and near Schenectady and Albany, it will feed those cities. But there is projected little through traffic other than trucking. For most of the proposed road there

is no need for an Interstate facility in this corridor, even based on the most optimistic development patterns. In light of this, one essential element of the reporting process obviously relates to the consideration of alternatives and the energy implications of the proposed action, particularly in the face of the growing energy crisis and its impact on the availability and reasonable cost of petroleum based fuels.

This raises, with particular reference to the instant proposed project, the relation of the continuing Federal and State highway-building program in the face of the growing national energy crisis and prospective shortage of petroleum supplies to continue to fuel the use of our highway system. This is appropriately to be related to evaluation of alternatives (A260). This aspect of environmental concern with regard to the continuation of the nation's current highway-building program, including the Interstate System itself, highlights the inconsistency of the continuation of the nation's highway-building program with the growing problem of meeting our national energy needs. It emphasizes the relative attractiveness, in this respect, of the rail and public transportation modes, vis-a-vis the truck and private automobile, and the terrible burden that ill-considered excess use of energy will have on the national economy itself, in terms of strain on our balance of payments, already warped by past mistakes in policy with regard to use of energy (A260).

In a recent projection by the National Petroleum Council (U.S. Energy Outlook - An Initial Appraisal, 1971-1985), national oil imports are expected to rise from an earlier level of 25.8% near the beginning of the current decade to 57% of domestic demand by 1985 (A261).

At the end of 1972, the balance of payments deficit (the amount by which imports exceeded exports) stood at \$2.5 billion, and the Department of Interior estimated that proposed oil imports by the year 1985 could raise this balance of payments deficit by \$27.5 billion -- an intolerable burden on our international economic position.

In another government report, issued by the Office of Emergency Preparedness in the White House, it was suggested that we begin adjusting the demand side of the equation, involving not only measures to retain performance while increasing efficiency, but also to reduce consumption (ibid.). Transportation accounts for 25% of our energy consumption (the three other big consumers being industry, electric utilities, and residential/commercial use). A261 But enormous differences in efficiency exist among the different modes of freight service, to the disadvantage of the highway/truck mode (ibid.). In particular the truck mode at 3,800 BTU's per ton mile is almost at the range of energy consumption of air freight, and both exceed by far energy efficiency for freight transport by pipeline, rail,

and waterway, as are revealed in the following table (A261):

Table 2. Energy efficiency for freight transport
(Source: E. Hirst, Oak Ridge National Laboratory,
cited in Science, Vol. 178, Dec. 8, 1972.)

<u>Item</u>	<u>BTU per ton mile</u>
Pipeline	450
Railroad	670
Waterway	680
Truck	3,800
Airplane	4,200

Recent consumption of motor fuel in the United States, as of 1971, is reported by the Federal Highway Administration of the Department of Transportation by release dated November 24, 1972 (A269-A270), showing that motor fuel consumption, alone, in the United States, was expected to reach 107 billion gallons in 1972, a 5.5% increase since 1971 (ibid.).

Still other comparative figures, these from the National Science Foundation, bear out the transportation efficiency, in terms of energy consumption, of the railroad as compared with the highway/truck mode of freight transportation. The National Science Foundation reported that transportation itself accounted for an increase of 166% in energy consumption in the 20 years between 1950 and 1970, mostly by reason of the massive shift to the automobile, the most inefficient mode of travel except the airplane (A262). The Foundation's figures indicated that the country's best buy, in terms of efficient use of energy for freight haul was certainly not the truck or airplane (ibid.). In terms of ton-mile per

gallon, the National Science Foundation reported, inter alia, that while pipelines carried materials at the rate of 300 ton miles per gallon, waterways 250, and railroads 200 ton miles per gallon, trucks did so at the much more energy-intensive rate of 58 ton miles per gallon (A262).

According to a report made by Dr. George W. Brown at the National Conference on the Transportation Crisis, Washington, D.C., in June 1972 (A158-A159), the needs of our transportation system in terms of the use of non-renewable energy resources was related to the energy crisis (A262-A263). His conclusion was that we could not continue to squander fossil fuel to run our inefficient motor vehicle transportation system (A263). The United States required 29.9% of the world's production of crude oil during 1969 to support our motor vehicle population. This consumption was accomplished by a country representing only 5.7% of the world's total population (ibid.). In energy terms, we expended 16 times as much energy for feeding motor vehicles as was needed for feeding our entire human population (ibid.). Four times as much fuel is required per passenger mile to move people in private automobiles as is required for half-empty 40-passenger busses. Ten times as many people per unit can be transported by bus in a given time, and rail passenger transport is even more efficient (ibid.). 34% more fuel is required to move a ton of goods in heavy trucks than is required

to move the same goods by rail (A263). Freeways, such as the instant project, provide an enormous subsidy to truck shipments and discourage the inherently more efficient rail shipments (ibid.). This squandering of fossil fuels caused the Director of the U.S. Geological Survey to state (A263): "in the United States, we have used more mineral fuels during the last 30 years than all the people of the world used previously. This enormous consumption will have to be doubled just to meet the needs of the people now living in the United States during the remainder of their lifetimes."

See, also, A263-268, A271-A278, A493, A501-A505, A507.

It is in light of these considerations, relating to national energy policy, that the failure and refusal of the responsible officials, State and Federal, to have reported in any meaningful way on the energy implications of the proposed construction (Affid. of B. Ketcham, Sept. 9, 1976, p. 15 - A493) establishes their failure to have complied with the requirements of Public Law 94-83, and of the Act itself.

POINT I

THE JUDGMENT BELOW SHOULD BE REVERSED; AND APPROPRIATE RELIEF GRANTED TO EFFECT COMPLIANCE WITH FEDERAL LAW (Answering New York State Defendants-Appellees' Brief, Points I and II, pp. 13-30; Brief for Federal Appellees, Points I and II, pp. 6-18).

A fair examination of the record will establish that there are genuine issues of fact, and that summary judgment was an inappropriate remedy (see Issues of Fact, Rule 56(c), F.R.C.P., Appellants' Brief, The Richmondville Property Owners Committee, pp. 16-18, and references therein to Record; Monroe County Conservation Council, Inc., 472 F.2d 693, 700-703 (2nd Cir., 1972) and authorities cited, Appellants' Brief, supra, pp. 19-20). The disputed issues of fact relate, in particular, to the procedures and substance of the reporting process under Federal law, and were not appropriately to be resolved in summary fashion to the detriment of the important Federal issues involved and their determination in the manner in which the District Court had undertaken to do so.

None of the cases upon which appellees rely (State Appellees' Brief, pp. 13-15, 16, 17-21, 24-25, 26-27, 28-29; Federal Appellees' Brief, pp. 5-8, 9, 11) involved genuine

and material issues of fact to the extent herein involved under Rule 56(c), F.R.C.P., or is otherwise in point.

Wholly without basis is any claim of laches or waiver (State Appellees' Brief, p. 11, ftn. 9, p. 12, ftn. 10). None of the prior modifications of the earlier injunction (Appellants' Brief - Richmondville, pp. 14-15) related to the broad issues of the case, as does this appeal, but rather to adjustments, for particular specified reasons, of the injunction to particular omitted or linking segments. Appellants took particular response to those modifications on the basis of the particular equities involved, with specific reservation of their questions as to the illegality of the highway as a whole (Affids. of Hoppen, Dec. 6, 1973, May 17, 1974, Jan. 22, 1976, Rec. on App., pp. 655, 664, 387, ff.). Lack of appellate review of those modifications of the injunction did not relate to the merits of the highway, which are now properly before this Court for the first time and appropriate for resolution (Rule 54(b), F.R.C.P., A547).

Further, with regard to any current activity by the State in the corridor, it was on notice of the pending appeals at the time that contracts were let, and is in no position under the circumstances to assert such an equitable defense (cf. A242-A252, A254-A255, A318, ftn. 80).

Conclusion

The judgment below should be reversed; and appropriate relief granted to effect compliance with Federal law.

Respectfully submitted

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COURT OF APPEALS
SECOND CIRCUIT

77-6027

Capital Region Citizens Committee, et al.,

Index No.

Plaintiffs-Appellants,
against

John A. Volpe, et al.,

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

Defendants-Appellees.

STATE OF NEW YORK, COUNTY OF Westchester

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

Plaintiffs-Appellants Richmondville Property Owners Committee and New
York State Coalition for Safe Transportation

That on the 27th day of May, 19 77 deponent served the annexed
Reply Brief of Plaintiffs-Appellants The Richmondville Property Owners
Committee, et al.,
on

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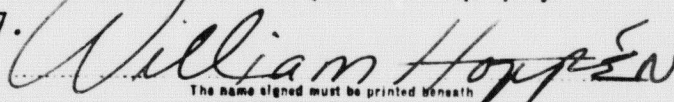
Attorney for Federal Defendants-Appellees.

attorney(s) for the respective parties as above indicated
in this action at the respective addresses

~~the address~~ designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~an~~ official depository under the exclusive care
and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this 27th day of May, 19 77.


The name signed must be printed beneath
William Hoppen

Attorney at Law